No. 84-1485

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN MORAN,

Petitioner,

—VS—

BRIAN K. BURBINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND THE AMERICAN CIVIL LIBERTIES UNION, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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OTHER AUTHORITIES

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No. 84-1485

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN MORAN,

Petitioner,

-vs-

BRIAN K. BURBINE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

Brief of The National Legal Aid And Defender Association, and The American Civil Liberties Union, As Amici Curiae In Support of Respondent

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INTEREST OF AMICI CURIAE

The National Legal Aid and Defender Association (NLADA) is a private, non-profit,

national membership organization headquartered in Washington, D.C. whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases, and 586 defender offices engaged in providing representation to indigents arrested on criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel plans and private practitioners.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to preserving and defending the principles embodied in the Bill of Rights. The Rhode Island Civil Liberties Union is the Rhode Island affiliate of the ACLU. The ACLU and its affiliates are, in particular, committed to preserving the right against

self-incrimination and the right to counsel embodied in the Fifth, Sixth and Fourteenth Amendments.

Such rights can only be guaranteed by the implementation of procedures designed to assure that criminal detainees are fully informed of their rights, that they are free to exercise those rights and that criminal interrogations are not unconstitutionally coercive. The ACLU has been involved in many cases before this Court, as well as in courts throughout the country, in which the proper scope and application of such procedures have been at issue.

Amici are vitally interested in ensuring that indigent criminal defendants are guaranteed their right against self-incrimination during custodial police interrogation, that counsel has access to suspects held in police custody, that suspects are informed that counsel is present and/or desires to talk with them, and finally, that the police accurately inform counsel of the status of interrogation of a suspect counsel represents.

In this case the Court will be deciding whether a waiver of the right to counsel can be knowingly and intelligently made if the arrestee is not informed by police that the attorney who assertedly represents him offered to be present for questioning but was not present because she was misinformed that there would be no questioning at that time. Amici respectfully request this Court to consider this brief on these significant public questions.

STATEMENT OF THE CASE

On the afternoon of June 29, 1977, Respondent Burbine and two others were arrested by the Cranston, Rhode Island, police and taken into custody in connection with a breaking and entering. Information gained from questioning the other two men, together with other information, led a Cranston detective to suspect Respondent's involvement in a homicide which had occurred in Providence, Rhode Island. Respondent Burbine

was given Miranda warnings after he had told the detective that his nickname was "Butch". Then Respondent Burbine refused to sign a waiver of rights form and refused to say anything further. Burbine v Moran, 753 F2d 178, 179-180 (CA 1, 1985).

At about 6:00 p.m. the Cranston detective called the Providence police and informed them that the other two arrestees had made statements implicating Respondent Burbine in the Providence homicide. At about 7:00 p.m. three Providence officers arrived at the Cranston police station. They first interviewed the other two arrestees and later, at about 9:00 p.m., talked with Burbine.

After being advised of his rights, Respondent was asked about the homicide and, appearing "fidgety", denied involvement. He was placed in a different room and about ten minutes later the Cranston detective went to that room because he heard repeated banging on the door. At that

point Respondent Burbine told the detective that he was "disgusted", "sorry", and wanted to make a statement. The Providence officers were summoned and met with Respondent in a main office to take a statement. Miranda rights were administered and Respondent Burbine indicated that he understood what his rights were. At about 9:30 p.m. he signed a waiver of rights form. Id., 180. He was later described as having been "shaky, in tears," but as having spoken clearly. A fifty-minute interrogation produced a typed inculpatory statement which Respondent Burbine signed at about 10:20 p.m.

Sometime between about 10:45 p.m. and 11:00 p.m. Respondent Burbine indicated that he had omitted some information and he was returned to the main room, read Miranda rights, and gave a second statement, which he signed at about 11:20 p.m. About noon the next day, June 30, 1977, at Providence headquarters, Respondent Burbine gave a third inculpatory statement.

While he was doing so, a Providence officer called the public defender office to request the presence of an attorney for an identification lineup. Assistant Public Defender Richard Casparian later arrived and assisted Respondent during the lineup. Id., 181.

On the evening of June 29, 1977 Respondent Burbine's sister called Casparian at his office, as he was representing Respondent on an unrelated case. This call occurred at about 7:45 p.m. Respondent Burbine had missed an appointment with Casparian that same afternoon. Casparian was not available, but another person took the call, during which Respondent's sister requested legal assistance for him on his current arrest. Assistant Public Defender Allegra Munson, a colleague of Casparian, was contacted and informed of the situation. Id., 180.

At about 8:15 p.m. Ms. Munson called the Cranston police station and asked for the detective division. A male voice responded,

saying "Detectives". Ms. Munson identified herself and ascertained that Brian Burbine was in custody; she explained that Mr. Casparian represented Respondent but was not available, and that she would act as Respondent's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Respondent or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence police were there or that Respondent was a suspect in the Providence homicide. Id., 180.

At a subsequent hearing, all of the officers involved denied receiving or knowing about Ms. Munson's call, and it has never been determined who spoke with Ms. Munson. Respondent Burbine was never told by the police of Ms. Munson's call, her offer of assistance, or the information given her. Id., 180.

The United States Court of Appeals for the First Circuit suppressed Respondent's statements and granted a new trial. Id., 187-188.

SUMMARY OF ARGUMENT

A full, fair, and reasonable opportunity to exercise the Fifth Amendment right to counsel requires that an arrestee be informed that an identifiable attorney is presently available and offering assistance during custodial interrogation. It is only when the arrestee is so informed that he or she has the material facts to knowingly and intelligently decide whether to forego that offer of assistance. Where an individual has not requested counsel and has chosen instead to make his own decisions regarding his conversations with the authorities, he should not be deprived even temporarily of any information relevant to that decision. To say that there is no right to counsel until there is a request, and simultaneously to withhold from the arrestee

information which materially bears on the likelihood that such a request will be forthcoming, is to manipulate the arrestee's knowledge of the realities of the situation in favor of enforcing any initial waiver of counsel's presence. The failure to advise Respondent that an attorney was presently available and offering to be present during custodial interrogation renders any waiver of counsel invalid.

An attorney representing the arrestee in an existing attorney-client relationship has the constitutional authority to assert the right to presence at a custodial police interrogiation for any charge, regardless of the arrestee's failure to request counsel. The Fifth Amendment right to counsel becomes operational either by a request for counsel by the arrestee, or by the assertion of an attorney-client relationship by a presently available attorney privately obtained by family or friends. Miranda does not authorize the police to exclude existing counsel from access to the

arrestee, over counsel's request, until such time as the arrestee actually requests counsel's presence. The traditional role of counsel is to confer with his or her in-custody client. A public defender who is appointed on one case need not be appointed for trial on a new case to consult with her arrested client and be present for custodial interrogation in the new case.

The right to the assistance of privately obtained counsel, obtained on behalf of an arrestee, requires that counsel's request to consult with the arrestee-client be granted promptly and that counsel's inquiries concerning the arrestee's status be answered honestly. The Sixth Amendment right to privately obtained counsel, unlike the right to court appointed counsel, originates at least when counsel undertakes an attorney-client relationship and, asserting that relationship, requests access to a client held in custody. Respondent Burbine's own lawyer in the case at bar happened to be a public defender

duly appointed on an earlier case. But having undertaken to act on Respondent's behalf at the request of his sister, and in the good faith anticipation of a future appointment in the matter at hand, that public defender was operating as Respondent's own lawyer, privately obtained on his behalf. The police officials in the case at bar thwarted that attorney-client relationship by misleading counsel about Respondent's interrogation status, and by failing to inform Respondent of counsel's inquiry and offer to be present for a lineup or interrogation. The police, having custody of one arrested for a crime, may not deny an attorney employed on behalf of the arrestee the right to see and advise that attorney's client.

The right to privately obtained counsel should attach, at least, when a person is arrested and held in custody; it should become operational when invoked by counsel. There is no significant state interest which justifies excluding counsel

from such consultation until the arrestee specifically requests counsel's presence pursuant to Miranda warnings. Counsel needs an honest response from the police concerning the status of the arrestee, including location, interrogation status, and the procedures for visiting. The police violate the right to counsel by, as here, misleading counsel by dishonest responses to counsel's inquiries. Public confidence in the criminal justice system will be lost if the practices which occurred in this case are upheld. The decision of the United States Court of Appeals for the First Circuit should be affirmed.

ARGUMENT

I. A FULL, FAIR, AND REASONABLE OPPORTUNITY TO EXERCISE THE FIFTH AMENDMENT RIGHT TO COUNSEL REQUIRES THAT THE ARRESTEE BE INFORMED THAT AN IDENTIFIABLE ATTORNEY IS PRESENTLY AVAILABLE AND OFFERING ASSISTANCE DURING CUSTODIAL INTERROGATION.

Attorney Allegra Munson was acting as Respondent's legal counsel, on request of his sister, when she called the Cranston police station on the evening of June 29, 1977. There was an existing attorney-client relationship between Respondent and Ms. Munson's public defender office, albeit on an unrelated case. The unidentified person who answered the call misled Ms. Munson about the interrogiation status of Respondent Burbine, and Respondent was not informed of her call, her offer of assistance, or the information that was given her. Although Respondent had not requested the presence of an attorney, he had the continuing right to do so. His decision not to do so cannot be deemed a

knowing and intelligent decision unless he was informed by the police that his own lawyer, Ms. Munson, had called and had offered to be present for any questioning, and had been told that the police were through with him for the night.

As the United States Court of Appeals for the First Circuit observed: "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available . . ." Burbine v Moran, 753 F2d 178, 185 (CA 1 1985), quoting from State v Haynes, 288 Or 59, 72; 602 P2d 272, 278 (1979), cert. denied, 446 US 945 (1980). It is only when the arrestee is informed that an identifiable attorney is presently available and offering assistance that the arrestee has the material facts to knowingly decide whether to forego that offer of assistance. The failure to timely inform the arrestee of specific counsel's availability and offer of assistance enforces the isolation of the arrestee and furthers his or her dependence on the police, while simultaneously

conferring on the police the power to regulate and determine what information the arrestee may receive. See People v Smith, 93 Ill 2d 179; 66 Ill Dec 412; 442 NE2d 1325, 1330 (1982), cert. denied, 461 US 937 (1983).

If there is no duty on the part of the police to inform the arrestee of counsel's present availability, then the police are effectively denying the arrestee a full, fair and reasonable opportunity to knowingly exercise the right to have counsel present during the interrogation. See Commonwealth v McKenna, 355 Mass 313; 244 NE2d 560 (1969). Police officials who forestall counsel's access to the arrestee and who refuse to inform the arrestee of counsel's present availability, pending an actual request for counsel, are restricting the opportunity to consult with counsel, and usually do so to facilitate a counselless interrogation. To argue that there is no right to counsel until there is a request, and simultaneously to withhold from the arrestee information that materially bears on the likelihood

that such a request will be forthcoming, is to manipulate the arrestee's knowledge of the realities of the situation in favor of enforcing any initial waiver of counsel's presence. The police are able, thereby, to freeze the flow of events in one direction and to create artificial "disinformation" that may predicate, as here, a decision to speak to them unaided by counsel.

In Michigan v Mosley, 423 US 96 (1975), Justice White, concurring, opined that "where the individual has not requested counsel and has chosen instead to make his own decisions regarding his conversations with the authorities, he should not be deprived even temporarily of any information relevant to the decision." Id., 423 US 109, n. 1. The information that an identifiable attorney is available and offering assistance for purposes of custodial interrogation is relevant information which the arrestee needs if the continuing opportunity to invoke the Fifth Amendment right to counsel is to be scrupulously honored.

Most states which have considered this problem have refused to afford the police the means to manipulate the material information available to the arrestee. See Commonwealth v Sherman, 389 Mass 287; 450 NE2d 566 (1983); State v Haynes, supra; People v Smith, supra; Commonwealth v McKenna, supra; State v Matthews, 408 So 2d 1274 (La 1982); State v Jackson, 303 So 2d 734 (La 1974); Weber v State, 457 A2d 674 (Del 1983); Commonwealth v Hilliard, 471 Pa 318; 370 A2d 322 (Pa 1977); Lewis v State, 695 P2d 528 (Okla Ct Crim App 1985); Dunn v State, ___ Tex Cr App ___; ___ SW2d ___ (1985);[1/] State v Jones, 19 Wash App 850; 578 P2d 71 (Wash Ct App 1977). Lodowski v State, 302 Md App 691; 490 A2d 1228 (Md Ct Spec App 1985), cert. docketed Maryland v Lowdowski, No. 85-23, 37 Cr L 4115, July 31, 1985; Elfadl v State, 61 Md App 132; 485 A2d 275 (Md Ct Spec App 1985),

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1/ Opinion not released for publication in permanent law reports - it is subject to revision or withdrawal. Westlaw, TX-CS, 8/19/85.

cert. docketed, Maryland v Elfadl, No. 85-24, 37 Cr L 4115, July 31, 1985. See also, People v Cavanaugh, 246 Mich 680, 688; 225 NW 501 (1929).

Other states have declined to require the police to inform the arrestee that counsel is available. State v Burbine, 451 A2d 22 (RI 1982); State v Johns, 185 Neb 590; 177 NW2d 580 (1970); State v Smith, 294 NC 365; 241 SE2d 674 (1978); Ohio v Chase, 55 Ohio St 2d 237; 378 NW2d 1064 (1978); Blanks v State, 330 SE2d 575 (Ga, 1985); State v Beck, 687 SW2d 155 (Mo 1985)(en banc).

The failure to inform Respondent, or any similarly situated arrestee, that an attorney is presently available and offering to be present during custodial interrogation renders the advice of rights inadequate and ineffective to support a valid waiver. North Carolina v Butler, 441 US 369 (1979); Johnson v Zerbst, 304 US 458 (1938)[2/]

2/ It is legitimate to require the police to inquire of an arrestee, who has not requested counsel's presence, whether he

(Footnote Continued on Next Page)

A. AN ARRESTEE'S OPPORTUNITY TO EXERCISE THE RIGHT TO HAVE COUNSEL PRESENT DURING CUSTODIAL INTERROGATION MUST BE AFFORDED CONTINUOUSLY, AND A FAIR OPPORTUNITY IS NOT AFFORDED WHERE THE ARRESTEE IS HELD INCOMMUNICADO AND IS NOT INFORMED THAT AN IDENTIFIABLE ATTORNEY IS ACTUALLY AVAILABLE AND SEEKING TO BE PRESENT FOR ANY INTERROGATION.

The Fifth Amendment right to counsel is one of the "concrete constitutional guidelines" for law enforcement agencies which this Court recognized in Miranda v Arizona, 384 US 436 (1966). These guidelines were deemed a necessary procedural support for the privilege against self-incrimination as

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(Footnote Continued From Previous Page)

> wishes to change his mind and request counsel once counsel has become available and offered assistance. See Edwards v Arizona, 451 US 477 (1981), Powell, J. joined by Rehnquist, J., concurring in result, Id., 451 US 490, to the effect that police legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney.

applied to the custodial police interrogation setting. Id., 384 US 441.

Viewing the right to counsel as one of the proper limitations upon custodial police interrogation, this Court determined that it is not merely a right to consult with counsel prior to, but also a right to have counsel present during, custodial interrogation. Id., 384 US 447, 470. Like all of the Miranda guarantees, the opportunity to exercise the right to have counsel present must be continuously afforded the arrestee throughout the interrogation. Id., 384 US 479. Although warnings to the arrestee about the right to counsel's presence, and the opportunity to request counsel's presence, were deemed minimal safeguards toward assuring the constitutional objective - to permit a full opportunity to exercise the privilege against self-incrimination in a police-dominated atmosphere - a warning and an opportunity to request counsel were but one set of alternatives designed to achieve that objective. Id., 384 US 467.

In Miranda, the Court did not erect limitations on the opportunity to exercise the privilege, rather, the Court attempted to off-set, and limit, the compelling pressures which inhere in the incommunicado status of the arrestee during the inquisitory process of custodial police interrogation. It is anomalous, therefore, for Petitioner to request this Court to turn the minimal safeguards of Miranda into a "constitutional straightjacket" to defeat communication between the in-custody arrestee and counsel attempting to intervene on his or her behalf. Yet, Petitioner has asked this Court to imprison the arrestee within his or her rights and to deny counsel's access to the arrestee (or notice to the arrestee of counsel's availability) in all save those situations where the arrestee expressly requests counsel.[3/] Petitioner thus argues, in effect, that Miranda protects, provides for, and prolongs the very police-dominated, isolated,

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3/ See Petitioner's brief, at 16.

incommunicado status of the arrestee that this Court avowedly tried to restrict. Miranda erected limitations on custodial interrogation, not on the full opportunity to exercise the privilege against self-incrimination.[4/]

The arrestee must be accorded a full, fair, and reasonable opportunity to exercise the Fifth Amendment right to counsel. There can be no full, fair and reasonable opportunity to have counsel present during custodial interrogation where law enforcement officials actively block information that the arrestee's own lawyer, including one obtained by family or friends, is present, or readily available, and prepared to offer a guiding hand, then and there, as needed, if needed. Nor can the opportunity to have counsel present be fully, fairly, or reasonably accorded where law enforcement

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4/ See Mathies v United States, 374 F2d 312, 316, n. 3 (DC Cir. 1967), Burger, J., [After Miranda, preindictment interviews are to be conducted "only after counsel has been given the opportunity to be present."]

officials resist efforts by counsel to be present, whether they overtly deny counsel access to his or her client, or covertly disarm counsel's vigilence by deception, trickery or delay. A genuine and present opportunity to confer with an attorney who asserts a representative capacity and a present availability is a far greater protection for the in-custody arrestee then the minimal safeguards of a warning and an opportunity to request that counsel eventually be obtained. The very pressures inherent in the custodial interrogation setting may create a sense of urgency, often yielded to by the arrestee, which would not otherwise prevail if identifiable counsel were known to be a short time and distance away.

B. A BALANCED APPROACH TO MIRANDA REQUIRES THAT POLICE ADMINISTRATION OF THE ADVICE OF RIGHTS BE COUNTER-BALANCED BY COUNSEL'S ADVICE WHERE COUNSEL IS AVAILABLE AND SEEKS TO BE PRESENT DURING A CUSTODIAL INTERROGATION.

The warnings to the in-custody arrestee

required by Miranda are susceptible to police manipulation through the device of extra-Miranda explanations of the value and meaning of those rights, and the relative disadvantages to the arrestee should he or she exercise those rights. This manipulation was recognized as a possible interrogation technique by Miranda itself. See, e.g., 384 US 454-455. The police may state the Miranda warnings and then elaborate upon them. See, e.g., Smith v Illinois, 469 US ___ (1984). Although there is no claim that such an undercutting explanation occurred in the case at bar, the possibility of police elaboration upon the value of the rights available to the arrestee threatens the very foundation of the Miranda decision. The unfairness of a rule that imposes no duty on the police to inform the arrestee that an identifiable attorney is presently available for the interrogation is evident; unless assertedly available counsel can counter-balance police denigration of the Miranda rights, the arrestee may be misled about the seriousness of the

situation and the value of those rights. In Michigan v Jackson, cert. grnt'd, May 28, 1985, No. 84-1531, ___ US ___; 37 Cr L 4069 (1985) the police did elaborate on the value of the right to counsel even though they also gave the requisite warnings.[5/] Where counsel is available to the arrestee, the very

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5/ The brief for Respondent in Michigan v Jackson provides the following quotation from that record:

> "SGT. GARRISON: Now I think you need a brick to hit you against a wall to realize that you're in serious trouble here and that the only way that you have any hope is by us. I don't know what your gonna think, now if you want an attorney, I'll tell you what an attorney is gonna tell ya, an attorney is gonna tell ya don't talk to the police. I can tell you that right now. Don't talk to the police. But, the attorney doesn't go to jail, does he?
> "SGT. HOFF: You know what the attorney does when you say that, the attorney knows that that's going to get a trial, even if he's appointed he gets paid by how much trial days." (JA 157-158).

See Brief of Respondent Robert Bernard Jackson, No. 84-1531, Statement of Facts, at 7.

fact of counsel's efforts to contact the arrestee will convey to him or her, if so informed, that an attorney deems the situation sufficiently serious to require the presence of counsel and that the arrestee may have underestimated the need and value of exercising the right to counsel. The arrestee is then aware that there is a check on the police officer's characterization of the value of exercising those rights. The offer of a second opinion by a professional counselor will cause the arrestee to deliberate on his or her decision to waive or exercise the right to remain silent and the right to counsel. Such a deliberate choice is the honorable goal this Court sought in Miranda:

> "[T]...the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. Id., 384 US 469-470

Any waiver of the right to have counsel present during custodial police interrogation must be deemed invalid where the arrestee is not informed that an identifiable attorney is present, or readily available, to assist him or her. Police deceit, trickery or deception which disarms the vigilance of a particular attorney, such as occurred in the case at bar (the attorney was informed that the police were not going to question Respondent further that night) is an important factor as well. Absent the misleading information to counsel, she would have appeared at the stationhouse, or have insisted on speaking to Respondent over the telephone before

her departure. The police could, under the rule espoused by Petitioner, simply refuse to inform the arrestee about counsel's call or presence and refuse to permit counsel access to the arrestee. Without the information that an identifiable attorney is presently available and offering assistance, the arrestee cannot knowingly determine whether to waive the right to counsel's presence.

C. AN ATTORNEY REPRESENTING AN ARRESTEE IN AN EXISTING ATTORNEY-CLIENT RELATIONSHIP HAS THE AUTHORITY, CONSTITUTIONALLY, TO ASSERT THE RIGHT TO PRESENCE AT A CUSTODIAL POLICE INTERROGATION FOR ANY CHARGE, REGARDLESS OF THE ARRESTEE'S FAILURE TO REQUEST COUNSEL.

Miranda defined the point of origin for the Fifth Amendment right to counsel as the beginning of custodial police interogation. Rhode Island v Innis, 446 US 291 (1980). It is then that the arrestee must be warned of the right to have an attorney present, and that if an attorney cannot be

afforded, one will be appointed prior to any questioning. Miranda also defined one way in which the arrestee could make the right to counsel operational — by requesting counsel. Miranda did not address the other modes by which the right to counsel could be made operational, and it did not limit the arrestee to one method of doing so. Miranda does clearly recognize that the right to counsel originates with custodial interrogation, and may be invoked by the arrestee at any time.

It ought not to matter how the right to counsel is made operational, as long as the point at which the right originates has arrived. It ought not to matter, for example, whether the right is made operational by virtue of a contractual relationship between counsel and third parties, usually family or friends, or by a request to intervene made to a public defender who has an existing, current appointment for that client. In either case, the right to counsel is "in being" by virtue of the custodial interrogation; the particular mechanism for

making the right to counsel operational may vary according to the historical facts. The important point is that the right to have counsel present is operational when counsel's present availability is asserted, regardless of who brings counsel into the case.

Miranda barely adverted to the existing attorney-client relationship and the right of counsel to communicate with his or her client. In Miranda, the Court recognized that it would be superfluous to advise one who had a lawyer, or who could afford one, that an indigent could have counsel appointed. The Court uniformly required that the advice be given to all individuals. Id., 384 US 473, n. 43.[6/] Similarly, Miranda recognized that some individuals may have an attorney present when warnings are initially given. Id., 384 US 474, n. 44. At no time did Miranda hold that a request for counsel was the sine qua non for counsel's presence at a

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6/ But see California v Prysock, 453 US 355 (1981).

custodial police interrogation. Rather, the request for counsel discussed in Miranda was the triggering device for the arrestee whose only access to counsel was through the offices of the police. Miranda assumed that there would be no attorney-client relationship in existence at the time of arrest and that the right to counsel originating at the time of custodial interrogation could not, practically speaking, be implemented other than by the arrestee's request.[7/] Miranda is silent on the problem of the arrestee who has a lawyer obtained by family of friends, unknown to the arrestee.

Miranda does not authorize the police to exclude existing counsel from access to the arrestee, over counsel's request, until such time as the arrestee actually requests counsel's presence. Miranda does not hold that the arrestee has the right to counsel only if the arrestee requests

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7/ This was a natural assumption, given the Court's then-recent decision in Escobedo v. Illinois, 378 US 478 (1964). See Miranda, supra, 384 US 465, n. 35.

counsel; there is nothing in Miranda which permits wholesale interference by the police with an existing attorney-client relationship. To say, as did the Rhode Island Supreme Court in this case[8/] that "Nothing in the Miranda opinion . . . has indicated that the right to counsel may be asserted by anyone other than the arrestee.", is to create rights for the police which Miranda never contemplated, namely, the right to hold the arrestee incommunicado against counsel's request to the contrary. See Darwin v Conneticut, 391 US 346 (1963) [arrestee held incommunicado to counsel].[9/]

An actual attorney-client relationship, created by family or friends by retainer on behalf of the arrestee, or resting on a pre-existing order of appointment for an indigent, places the arrestee well within the minimum protections of Miranda. The decision in Miranda went beyond protecting only those individuals who had lawyers. Individuals with lawyers should not have less protection.

8/ State v Burbine, 451 A2d 22 (RI 1982)

9/ See also, cases cited in footnote 7.

The Fifth Amendment right to counsel attaches at the point of custodial interrogation. Amici curiae argue that it becomes operational, and authorizes an attorney's presence at such interrogation, when the attorney-client relationship is entered into and asserted by the attorney. It is not, as Petitioner argues, that an attorney is exercising Miranda rights for the arrestee. Rather, the attorney seeking to confer with his or her in-custody client is exercising the traditional function of counsel in a setting constitutionally recognized as affording the arrestee the guiding hand of counsel. See People v Cavanaugh, 246 Mich 680, 688; 225 NW 501 (1929),[10/]

10/ The Michigan Supreme Court long ago recognized the traditional authority of counsel as a matter of state law:

> "The defendant was held incommunicable. He could not send for or employ counsel. His father was refused right to see him. When an attorney, presumably employed by his father, appeared at the jail and asked to see defendant, he was refused the right to do so until the attorney

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A public defender, unlike retained counsel, is ordinarily only available to an indigent arrestee, on the family's request, when the defender already represents that arrestee in an earlier case. Where, as here, there is an established attorney-client relationship for a pending earlier case, the public defender has a reason, indeed a duty, to intervene on behalf of that client on the family's request.[11/]

The new charge for which the arrestee is interrogated may produce severe and complex consequences in the pending case, such as bond, probation, or parole revocation. Plea-bargaining in the pending case may be affected if a confession occurs. A pending trial may require additional and

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> started for the courthouse to get a writ of habeas corpus. In this State a parent may not be denied the right to see and have conversation with a child in jail and accused of crime. Neither may police, having custody of one accused of crime, deny an attorney, employed by or in behalf of a prisoner, the right to see and advise the accused."

11/ Private counsel also may be retained for a client having multiple charges.

significantly different preparation, based on the possibility of similar-act evidence and admissions gained by police at the interrogation on the new case. Sentencing, or an appeal, may be pending in the earlier case, and the consequences of an increased sentence, a consecutive sentence, or an habitual offender sentence, must be considered. All of these factors require the attention of counsel and support counsel's diligence in seeking to confer with and advise the arrestee about the total consequences of a confession. The arrestee in this situation is not simply faced with a decision whether to confess; yet the arrestee may think so, especially if he or she is not aware of the consequences of doing so in the earlier case. The arrestee is faced with much the same complexity as the accused going to trial, and therefore has an equal need of counsel's assistance.

Even where there is no prior pending case, and thus no appointed counsel operating under an existing order of appointment, the third-party

retention of counsel is a significant fact, denoting that someone, usually the family, doubts that the arrestee is capable of making the choices required in the custodial interrogation setting without the assistance of counsel. The decision to make operational the Fifth Amendment right to counsel should be honored as a societal interest, flowing from the community's justifiable apprehension of incommunicado interrogation. American families and friends are entitled to resist the isolation of the arrestee by making operational the right to counsel.

The formal appointment of a public defender on a given case on which the arrestee is to be interrogated is unnecessary where there is an existing order of appointment on a prior, pending case.[12/] The State has already recognized that the

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12/ The First Circuit in the case at bar limited its holding to lawyers having a continuing relationship to the client and his family as would parallel a privately retained lawyer. Burbine v Moran, 753 F2d 178, 187, and see 183 n. 3, (CA 1, 1985).

arrestee is an indigent person. The public defender need not be appointed for trial in the new case to consult with the arrestee and be present for custodial interrogation in that case. As mentioned, there is the possibility of an impact of the interrogation on the existing case. Further, to allow the affluent to retain counsel but to force the indigent to await the ponderous mechanism of formal appointment is to discriminate on the basis of wealth in favor of the former and against the latter. The existence of a present attorney-client relationship with a public defender should suffice.

In some localities, an indigent may be represented on one case by a public defender assigned from a list of attorneys. After arraignment on a new charge, the same arrestee may be appointed a private attorney who is on the list. The fact that the public defender may not be appointed for trial on the later case does not alter the availability of that defender, then and there, to act as temporary counsel for purposes of custodial

interrogation. Indeed, the public defender may be the only attorney the arrestee has at the moment. To hold forth the Fifth Amendment right to counsel at the inception of custodial interrogation, but to restrict the method of making that right operable to only those having private means, would be an unwarranted and unfair discrimination based on wealth. To further restrict the arrestee to one mode of making the right to counsel operational - by his or her own request - would ignore the traditional role of the attorney in an existing attorney-client relationship. A lawyer's job is to assert rights on behalf of clients.

The Fifth Amendment right to counsel, originating as it does at the inception of custodial interrogation, can become operational by virtue of an attorney-client relationship, even absent a request by the arrestee. Respondent's sister placed in operation his right to counsel. The public defender assented to that request in this case. The police should have honored counsel's request to assist her

client by, at minimum, accurately informing counsel of the status of interrogations, informing Respondent of her offer of assistance, and providing access to Respondent if so requested by either.

II. THE RIGHT TO THE ASSISTANCE OF PRIVATE COUNSEL, OBTAINED BY OR ON BEHALF OF AN ARRESTEE HELD IN POLICE CUSTODY, REQUIRES THAT COUNSEL'S REQUEST TO CONSULT WITH THE ARRESTEE-CLIENT BE GRANTED PROMPTLY, AND THAT COUNSEL'S INQUIRIES CONCERNING THE ARRESTEE'S STATUS BE ANSWERED HONESTLY.

In addition to his Fifth Amendment claim — that the police conduct here fatally undermined the volunteriness of the Respondent's confession — the Respondent also alleges that he was denied his Sixth Amendment right to consult with counsel previously retained by him in another case.[13/] That right of

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13/ Though counsel was a public defender, the relationship with the client was established by two different means: first, counsel already represented the Respondent in a prior action which would necessarily be affected by the arrest in question, and counsel would almost certainly be appointed to represent the same client in his later difficulties; second, counsel was asked by the Respondent's sister to undertake the representation.

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consultation with a lawyer already working on a defendant's behalf is necessarily broader than the defendant's right to have counsel appointed. Thus, although a Sixth Amendment right to appointment of counsel may not attach "until the initiation of adversary judicial proceedings,"[14/] United States v Gouveia, ___ US ___, ___ (1984), any person incarcerated must have, at least, the right to know that counsel is retained, and is available for consultation and assistance.

Moreover, particularly where counsel represents

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> Either means of representation by retained counsel -- prior representation or the direction of a close family member -- is sufficient to trigger the arrestee's right to consult with that counsel. As the Court of Appeals noted, this is not a case that threatens "an influx of volunteering attorneys with no past or present relationship to the client." 753 F2d at 187.

14/ Of course, the Fifth Amendment may require appointment of counsel earlier. See discussion supra and Miranda v Arizona, 384 US 436 (1966).

the client in a previously pending criminal action, the Sixth Amendment right to counsel in that prior case is abridged when counsel is denied access to the client in a later arrest. Clearly, the later arrest may have many serious repercussions for the success of the original representation and, again, the client must at least be informed that counsel is available for consultation.

The core meaning of the right to counsel is the right to retain one's own counsel at one's own expense. Beaney, The Right to Counsel in American Courts, 21, 32 (1955). Chandler v Fretag, 348 US 3 (1954).[15/]

15/ The right to the appointment of counsel at public expense evolved from the right to private counsel. Powell v Alabama, 287 US 45 (1932); Gagnon v Scarpelli, 411 US 788 (1973)[Fourteenth Amendment]; Johnson v Zerbst, 304 US 458 (1938); Gideon v Wainwright, 372 US 335 (1963) [Sixth Amendment]. While the "fair-adjudication" interest which informs the right to court-appointed counsel may dictate the scope of that right, see e.g., Ross v Moffit, 417 US 600 (1974) [no right to court-appointed counsel for

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Respondent Burbine's own counsel in the case at bar happened to be a Allegra Munson, a public defender whose office had been duly appointed to represent him on an earlier, pending case. Ms. Munson telephoned the Cranston police station because she was standing in for a colleague, and because she was acting as Respondent's legal counsel at the request of his sister. Having undertaken to act on Respondent's behalf, and in the good faith anticipation of the future appointment of her office in the matter at hand, Ms. Munson essentially was operating as Respondent's own lawyer, privately obtained on his behalf.[16/] An attorney-client

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> discretionary appeal to state Supreme Court following counseled direct appeal in state intermediate court], a similar interest is not the rationale for the right to use one's own lawyer as one's representative in dealings with government officials. Adverse state action, in the form of an arrest and incarceration, suffices to require the state to recognize the right to representation by one's own counsel.

16/ As stated previously, Respondent's counsel also must be deemed to have had a

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relationship was already established between Respondent and his public defender attorney. When that attorney undertook to act on Respondent's behalf upon the request of his sister, and asserted the attorney-client relationship, the constitutional right to the assistance of privately obtained counsel was invoked. While Respondent could repudiate the attorney-client relationship, had he known about it, he was not so informed. The police officials in this case thwarted that attorney-client relationship by misleading counsel about Respondent's interrogation status, and by failing to inform Respondent of counsel's inquiry and offer to be present for a lineup or interrogation.

In Escobedo v Illinois, 378 US 478 (1964), the Court suppressed a confession made during a

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> continuing interest in Respondent's in-custody status based upon her appointment in the earlier case, and the consequences for that case of his subsequent arrest and interrogation by police.

preindictment custodial interrogation where both the arrestee and his retained counsel requested and were denied the opportunity to consult with each other. Although the precise holding of Escobedo has been narrowly defined, Johnson v New Jersey, 384 US 719, 733-734 (1966), and limited to its facts, Kirby v Illinois, 406 US 682, 689 (1972), Escobedo offers useful guidance for the case at bar. First, the Court cited with approval People v Donovan, 13 NY2d 148; 243 NYS 2d 841; 193 NE2d 628 (1963) [held: a confession taken from a defendant during a period of preindictment detention, after his retained attorney had requested and been denied access to him, could not be used against him at trial]. Escobedo, supra, 378 US 486-487. In Donovan, supra, the New York Court of Appeals said:

> "It would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police." Id., at 152; 193 NE2d at 629.

Escobedo also refused to apply Cicenia v LaGay, 357 US 504 (1958) to the situation before it, deeming Cicenia inconsistent, "and not to be regarded as controlling". Id., 378 US 492.

This Court has previously considered, and rejected the Sixth Amendment claim asserted here. Cicenia v LaGay, 357 US 504 (1958). However, the analysis of Cicenia has long since been discredited and the decision was specifically repudiated by this Court. Miranda v Arizona, supra at n. 48.

In Cicenia the accused was incarcerated and, like Respondent in this case, did not specifically request counsel. Nonetheless, a counsel previously retained by the accused arrived at the police station, requested access to his client, which was refused until after the accused confessed. In rejecting the defendant's Sixth Amendment claim, the Court relied on Crooker v California, 357 US 433 (1958) — which held that even when an accused requests an attorney the police need neither comply nor discontinue their interrogiation -- and the following rationale:

> "... petitioner would have us hold that any state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circumstances involved. Such a holding, in its ultimate reach, would mean that state police could not interrogate a suspect before giving him an opportunity to secure counsel." 357 US at 509.

Today, of course, the right to the presence of requested counsel during interrogiation is settled. Miranda, supra. It necessarily also follows that the Sixth Amendment includes the right to be notified that counsel is available for consultation and assistance during such an interrogation. Indeed, the Miranda Court anticipated this conclusion, though in dicta, by observing that in Escobedo, supra, the police not only denied the defendant's request for counsel:

> "The police also prevented the attorney from consulting with the client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake." 384 US at 456, n 35.

Moreover, Escobedo and Miranda aside, there is good reason to question the soundness of Cicenia. In a footnote in Cicenia, the Court relied upon state cases that refused "an accused" the right to consult with counsel during the period between arrest and arraignment. In that same footnote, the Court observed: "Most States have not had occasion to rule on the issue before us, and it is generally quite unclear in state law when the right to have counsel begins. See Beaney, The Right to Counsel in American Courts, 127-128; 3 ALR 2d 1003, 1032, et seq." Cicenia, Id., 357 US 510 n. 4.

Professor Beaney discussed the scope of the right to counsel, as then interpreted by state courts, and in doing so, wrote:

> "Apparently, in our state jurisdictions there is no procedure short of obtaining a court order which can compel officials to permit access to the prisoner by retained counsel." Beaney, at 127. [footnotes omitted].

However, Professor Beaney failed to refer to People v Cavanaugh, 246 Mich 680, 686; 225 NW 501 (1929) where the Michigan Supreme Court said:

> "An accused may be apprehended and held in safe custody to answer an accusation in court, but the custodian of his person possesses no inquisitorial power or right to hold him incommunicable while endeavoring to exact a confession. Holding an accused incommunicable to parents and counsel is a subtle and insidious method of intimidating and cowing, tends to render a prisoner plastic to police assertiveness and demands, and is a trial of mental endurance under unlawful pressure." Cavanaugh, at 686.

In Cavanaugh, an attorney retained by the suspect's father appeared at the jail and asked to see the defendant. He was refused the "right to do so" until he was about to get a writ of habeas corpus. Id., 246 Mich 688. The Court further said:

> "Neither may police, having custody of one accused of crime, deny an attorney, employed by or in behalf of a prisoner, the right to see and advise the accused." Id., 688.[17/]

17/ From the record the record quoted in the Cavanaugh opinion it appears that the suspect was an arrestee, and not an "accused"; he had been arrested and held for three days before he confessed. The

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The only right to counsel that could have attached on the facts of Cavanaugh was the right to retained counsel. Thus, in 1929, twenty-nine years before Cicenia, at least one state accepted as a given the reciprocal rights of a privately obtained attorney and his client to consult during custodial police interrogation.

Today, the right to have appointed counsel present during custodial police interrogation, upon the request of an arrestee, is settled. Miranda, supra; Edwards v Arizona, 451 US 477 (1981). The major concern expressed in Cicenia v LaGay, supra, is, therefore, moot. The right of privately obtained counsel to gain access to the in-custody arrestee

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> police admitted to holding the suspect incommunicado, but denied that he had requested to see an attorney. Id., 687. The conviction was reversed and a new trial granted "at which the most searching examination of all the circumstances surrounding his alleged confession will be permitted." Id., 689.

was recognized, in principle, in Escobedo, and that principle is supported by Miranda, supra, n. 35; People v Cavanaugh, supra; and People v Donovan, supra.[18/]

18/ To the extent that Escobedo has been construed as applying the Fifth Amendment right to counsel, Kirby, supra, it supports the rule that privately obtained counsel must be afforded access to a client held in police custody, on counsel's request.

While the Fifth Amendment right to counsel could and should support the authority of counsel to gain access to and consult with the in-custody arrestee, the primary reason for counsel's presence under the Fifth Amendment is to protect the free exercise of the privilege against self-incrimination. For the arrestee who elects to make a statement, even against the advice of counsel, there is a Sixth Amendment interest furthered by requiring counsel's presence. Absent counsel's presence, the police who obtain a statement from the arrestee are the interrogators, recorder's and reporters of that statement. At the subsequent trial the fact-finder is forced to rely largely upon the police to obtain an accurate report of the statement, even apart from any disputes as to the voluntariness of the decision to speak, or the adequacy of warnings regarding Miranda rights. The intonations and connotations of

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This Court has said that the purpose of the

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> questions and answers during an interrogation are important, because police officers often testify about what they understood the arrestee to have meant when he said certain words and phrases, rather than reporting strictly the questions and answers. Paraphrasing often occurs during testimony. While cross-examination is available at trial to allow counsel to inquire behind reportorial defects, cross-examination is not an adequate protection. What is needed is counsel's presence at the custodial interrogation. Thus, Miranda recognized that there is the possibility that the Fifth Amendment right to silence would be waived, but that counsel's continued presence would be required:
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> > "The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial." See Crooker v California,

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right to counsel is protect "an accused from conviction resulting from his own ignorance of his legal and constitutional rights":

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> 357 US 433, 443-448 (1958) (Douglas, J., dissenting). Miranda, Id., 384 US 470.

> If the right to counsel at custodial police interrogation rests solely upon the Fifth Amendment, and the need to protect the privilege against self-incrimination, then it would appear that the police could simply require counsel to leave the room once the accused decides to talk. For if there is no more privilege to protect, then there is no need for counsel to protect it. The rationale for counsel's continued presence at an interrogation where the accused elects to speak to the police must be the Sixth Amendment and the trial-related needs of the accused for a fair inquiry, recording, and reporting of his statements. Moreover, as illustrated by Escobedo itself, unfair inquiry by the police can take the form of erroneous legal advice regarding the incriminating nature of any responses. Id., 378 US 482, 486.

> The nature of the confrontation at a custodial interrogation, and the possibility that the arrestee will elect to talk to the police, are factors that make counsel's presence necessary to preserve the basic right to a fair trial. United States v Wade, 388 US 218, 227 (1967); United States v Ash, 413 US 300, 314 (1973).

> "The purpose of the constitutional guaranty of a right to Counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution." Johnson v Zerbst, 304 US 465.

Although addressing the right to appointed counsel for a defendant at trial, Johnson v Zerbst observed that the Sixth Amendment requires the appointment of counsel for an accused who "is unable to obtain counsel" and who has not waived the constitutional guarantee. Id., 304 US 468.

The Court has not resolved the point at which the right to privately obtained counsel attaches under the Sixth Amendment; indeed, the law has developed in the direction of the attachment of the right to appointed counsel.[19/] In Gagnon v

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19/ In United States v Gouveia, ___ US ___; 104 S Ct 2292 (1984) the Court addressed the question of whether the

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Scarpelli, 411 US 778, 783 n. 6 (1973), the Court

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> Sixth Amendment requires the appointment of counsel before indictment for indigent prison inmates confined in administrative detention. The Court reversed the lower court's holding that the Sixth Amendment had attached. Significantly, Gouveia did not involve custodial interrogations, and rejected the notion that the right to counsel attaches at the time of arrest.
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> The formality of accusatory judicial proceedings, although an important point in a criminal case where the Sixth Amendment right to counsel clearly does attach, Brewer v Williams, 430 US 387 (1977); Massiah v United States, 377 US 201 (1964), ought not to limit, absolutely, the scope of that right. The indicted defendant who has not yet met his or her lawyer at the time of a custodial police interrogation has no greater need for a lawyer's presence than the need experienced by defendants such as Danny Escobedo, and Respondent. Yet the indicted defendant is said to be "entitled" to a lawyer, see McLeod v Ohio, 381 US 356 (1965); Hancock v White, 378 F2d 479 (CA1 1967), while Respondent, and Danny Escobedo, merely had a lawyer. While the formal commencement of adversary judicial proceedings commits the state to a prosecution, and, therefore, that test indeed may be more than symbolic, the need to preserve trial defenses is just as real prior to the formal commencement of adversary judicial proceedings when the state's agents have dedicated

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left open the question whether a probationer or parolee has a due process right to retained counsel when the state would not be required to furnish counsel for an indigent. In Scott v Illinois, 440 US 367 (1979) the Court limited the right to appointed counsel under the Sixth Amendment to individuals

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> themselves to prosecuting the arrestee and intend to do so. In either situation, the state has already begun to prepare its case for trial. Regardless of the formality of an indictment, the arrestee has a similar need. The Sixth Amendment right to counsel provides for counsel to assist in the defense, and should attach when the need to defend begins.
>
> In Gouveia the majority of the Court approvingly quoted language from the plurality opinion in Kirby v Illinois, supra, 406 US 688-689, that the Sixth Amendment right to counsel attaches only at the time that adversary judicial proceedings are initiated. However, in light of the need for counsel for trial preparation, the similar practical realities facing the accused and the arrestee in custodial police interrogations, and the principle of Escobedo v Illinois, supra, the Court should not so limit the attachment of the Sixth Amendment right to appointed counsel in the case at bar.

who risk incarceration. Yet no one would seriously argue that one tried for a misdemeanor for which a fifty dollar fine could be imposed could not use retained counsel for trial. It would be equally implausable to argue that because there is no right to appointed counsel for a discretionary appeal, one could not employ counsel on one's own to prepare such an appeal. See Ross v Moffitt, 417 US 600, 616 (1974). Nor would it matter if counsel volunteered to try the case without a fee agreement. A public defender representing a client on a serious felony charge might volunteer to try a misdemeanor case for that same client to avoid the adverse consequences of a misdemeanor conviction on the pending felony case. The constitution itself ought to be indifferent to the motivation of counsel, but solicitous of the attorney-client relationship, in such an instance.

At minimum, the right to privately obtained counsel should attach when a person is arrested and held in custody, and it should become operational

when invoked by counsel who has been privately obtained on behalf of the arrestee, and who asserts that representative capacity by requesting access to the client. In Miranda, the Court referred to the English procedure under the Judges' rule. "The right of the individual to consult with an attorney during this period is expressly recognized." Id., 384 US 488, and note 58.

The Federal Bureau of Investigation informed this Court that: "when counsel appears in person, he is permitted to confer with his client in person" Miranda, Id., 384 US 485.[20/] It is simply reasonable for the Constitution to recognize that the role of counsel is to advise an incarcerated client when counsel is called into the case by family or friends. Regardless of whether an attorney is a public defender or in private practice, a midnight phone call from the family, requesting a visit to an incarcerated client, is a routine occurrence. There

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20/ See United States v Hinckley, 672 F2d 115, 121 (CA DC 1982).

is no significant state interest to justify excluding counsel from such consultation until the arrestee specifically requests counsel's presence pursuant to Miranda warnings.[21/]

21/ There are many reasons to require access by counsel, rather than mere notification of counsel's availability. First, the police control the notification process, and that fact alone expresses to the arrestee the very isolation which counsel's access could dispel. Second, the family may be concerned for the arrestee's health or mental status -- suicides do occur in jail where the terror and isolation of arrest and detention are pronounced. The family may believe that the arrestee was injured, even beaten, at arrest, and want to be assured that adequate medical treatment is provided. Counsel's ability to dispel the arrestee's sense of isolation by conveying support and reassurance is a significant interest. The ability of the police to wholly isolate the arrestee, and refuse any information to or from the outside world, is an awesome power. Access by counsel, as a representative of the outside world, to assure that the arrestee is in a specific place, and alive, is necessary to a civilized society's ability to govern with decency and legitimacy. Public confidence in the criminal justice system depends, in part, on the ability of the public to monitor the conditions and status of a family

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Obviously, some non-indigent persons do not have lawyers, or family or friends who will obtain a lawyer, and therefore, the invocation of the right to private counsel, for those individuals, will not occur unless the individual requests an opportunity to obtain counsel. Equally, not all indigents have a relationship with a public defender, and they are similarly removed from the possibility that their family will obtain a public defender's intervention. But any recognition of the right of access by

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> member subject to the power of arrest and incarceration. Counsel also needs to learn from the arrestee the facts pertinent to the arrest, so that necessary legal procedures may be employed, where appropriate, such as habeas corpus or bond, and also so that preparation of a defense may begin at the optimal moment. Even the very charges that eventually will be brought may change, if counsel, armed with the facts, can discuss the case with the charging authorities prior to charges being brought. Few of these interests are furthered by permitting the police to exclude all access by counsel and to permit only minimal communication, on their terms and in their manner.

private counsel, obtained by third parties of means, requires that an indigent arrestee also be allowed the right to private counsel where the free services of counsel are in fact obtained. Douglas v California, 372 US 353 (1963); Griffin v Illinois, 351 US 12 (1956); Ross v Moffitt, 417 US 600 (1974).

Clearly, counsel needs an honest response from the police concerning the status of the arrestee, including location, interrogation status, and the procedure for visiting. The police ought not to be permitted to interfere with the exercise of the right to private counsel by misleading counsel, as was done in the case at bar. Public confidence in the criminal justice system will falter, and be lost, if the practices which occurred in this case are upheld. Either the Sixth Amendment right to counsel, or the Fourteenth Amendment due process right to private counsel, should apply and protect the right to the assistance of privately obtained counsel for Respondent in this case.

CONCLUSION

The United States Court of Appeals for the First Circuit correctly decided the case at bar, and its decision should be affirmed. Respondent did not and could not knowingly and intelligently waive the right to counsel where he was not informed that his lawyer was presently available and offering to be present for interrogation, or that she had been told that there would be no questioning that night. Moreover, the misleading police response to counsel interferred with the attorney-client relationship. This Honorable Court should affirm the right to counsel to gain access to a client held in custody, and condemn the police tactics that occurred in this case. Respondent's right to counsel was violated. For all of the foregoing reasons, the relief granted below should be affirmed.

Respectfully submitted,

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